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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 564

AMERADA PETROLEUM CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (Pet. 21-26) is reported at 293 F. 2d 572. The orders of the Federal Power Commission (J.A. 162-67, 177-83) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1961. A petition for rehearing, timely

filed, was denied on August 24, 1961. The petition for a writ of certiorari was filed on November 21, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission may reject a filing for an increased natural gas rate on the ground that it seeks to change the rate in effect during the period of suspension of an earlier increased-rate filing.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Natural Gas Act and of the Commission's regulations are set forth in the petition at pages 46-49.

STATEMENT

Petitioner, an independent producer of natural gas, sells gas to El Paso Natural Gas Company under nine contracts involved in this case. To reflect the operation of "favored nation" clauses in these contracts, petitioner on August 31, 1959, and September 8, 1959, respectively, filed notices that its rates under six of these contracts would be increased to 13.34802¢ per Mcf effective October 1, 1959, and under the other three, effective October 9, 1959. On September 25, 1959, and October 7, 1959, the Commission ordered hearings to determine the lawfulness of each of the proposed increased rates and suspended their operation until March 1, and March 9, 1960, respectively. (Pet. 22-23).

About two months after these filings, on November 30, 1959, petitioner tendered for filing a proposed change in rate to 15.5¢ per Mcf under each of the nine contracts (Pet. 23; J.A. 127 [1]). These changes, which were the result of contract renegotiations, were sought to be made effective January 1, 1960, *i.e.*, prior to the expiration of the period of suspension then in effect for the earlier proposed rate increases (Pet. 23; J.A. 127). The Commission, on December 18, 1959, suspended the operation of the increased rates proposed in November until June 1, 1960 (Pet. 23). Thereafter, on February 5, 1960, it advised petitioner that the November 30 increased-rate filings had been considered as superseding the August 31 and September 8 filings and that therefore the proceedings relating to those suspended rates were terminated as moot (Pet. 23; J.A. 132-36).

Petitioner then moved the Commission to place in effect the first series of increased rates and on March 7, 1960, filed a petition for rehearing and reconsideration of the Commission's order of February 5, 1960, claiming a right to use these rates as of March 1 and 9, 1960, *i.e.* upon the expiration of five months after the effective date proposed (Pet. 23; J.A. 137-44, 151-156). In response to this petition, the Commission on April 5, 1960, reinstated the suspension proceedings with respect to the increased

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[1] Any discrepancies between the record references in this brief and those used by petitioner are apparently due to the fact that petitioner has used the pagination of the original Commission Record which is shown at the top of each page in the parties' Joint Appendix, while we have used the pagination of the Joint Appendix itself.

rates filed on August 31 and September 8, but rejected, without prejudice to their timely resubmission, the filings of November 30, 1959, which had previously been accepted for filing (Pet. 23; J.A. 162-67). The Commission explained that its general policy and interpretation under the Natural Gas Act was that the rate in effect prior to a suspension period remains in effect and should not be changed during the suspension period. Accordingly, it had regarded the November 30 filings as superseding the then-suspended earlier filings, since such action was considered to be less onerous to petitioner. But since petitioner insisted that the second filings were not intended to supersede the earlier ones, the Commission found it necessary to reject the later filings in order to effectuate the Act as interpreted by the Commission.[2] Petitioner's application for re-

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[2] F.P.C. Rules of Practice and Procedure, §§ 2.4(f), 2.52, 18 C.F.R. 2.4(f), 2.52 (Pet. 48-49), set forth a statement of general policy and interpretation that "the prior existing rate schedule continues in effect and should not be changed during suspension." F.P.C. Regulations under the Natural Gas Act §§ 154.94(a), 154.94(e)(2), 18 C.F.R. 154.94(a), 154.94(e)(2), applicable to independent producers which are "natural gas companies" within the meaning of the Act, provide, as does Section 4(d) of the Act, only for changes in presently *effective* rates.

The orders suspending the rates tendered for filing on August 31, 1959, and September 8, 1959, included the following standard language included in independent producer rate suspension orders (J.A. 119, 124):

> (C) Neither the supplements hereby suspended, nor the rate schedules sought to be altered thereby, shall be changed until these proceedings have been disposed of or until the periods of suspension have expired, unless otherwise ordered by the Commission.

hearing (J.A. 168-74) was denied May 27, 1960 (J.A. 175-76).

On April 25, 1960, petitioners refiled the increased rates which had been rejected on April 5, 1960, and requested that the filings be allowed to become effective, at least subject to refund, as of June 1, 1960, the date on which they would have become effective if the Commission had not found the two sets of increased rate filings incompatible as originally made (*e.g.*, J.A. 8, 178). By order dated May 25, 1960, the Commission set these rates for hearing and suspended their operation until November 1, 1960 (Pet. 23; J.A. 177-83). Petitioner's application for rehearing of this order (J.A. 184-206) was denied on July 21, 1960 (J.A. 207-211).

On petition for judicial review of the Commission's orders of April 5, 1960,[3] and May 25, 1960, the court of appeals affirmed, holding that the Commission had the authority to reject notices of increased rates, sought to be made effective during the period that the prior rate changes relating to the same sales were suspended (Pet. 24-26).

ARGUMENT

Petitioner's contention that the Commission exceeded its statutory authority in rejecting increased-rate filings intended to become effective during the statutory 5-month suspension period of earlier in-

[3] The lower court erroneously referred to this order in one place in its opinion as the order of "February 5". See Pet. 23.

creased-rate filings is plainly without merit. Nor is there any conflict between the decision in this case and that in *Willmut Gas & Oil Co.* v. *Federal Power Commission*, 294 F. 2d 245 (C.A.D.C.), petition for writ of certiorari pending, No. 506, this Term. The decision of the court below on the question before it was clearly correct; and in the absence of any conflict, the legal question presented is not of sufficient importance to warrant review by this Court.

1. The principal contention of petitioner, that the Commission has no authority to reject changed rate filings on the ground that these changes are intended to become effective during the period of suspension of a prior change in rates relating to the same sales of gas, ignores the terms, purpose, and history of the Act, particularly the suspension provisions of Section 4(e), and the well supported interpretation of those provisions by the Commission.

As the court below correctly held, the Commission has consistently declared its policy and its reading of the Act to be that the existing effective rate schedule is to continue in effect during the suspension period of a new filing. Indeed, more than 16 years ago the Commission formally interpreted its suspension powers and concluded, *inter alia*, that "[d]uring suspension, the prior existing rate schedule continues in effect and should not be changed during suspension." See Sections 2.4(f) and 2.52 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 2.4 (f) and 2.52 (Pet. 48-49). The court below properly gave consideration to this interpretation in ar-

riving at its construction of the Act. See *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137. And the Commission's interpretation is fully supported by statements of this Court, by administrative interpretation of a like suspension provision in the Interstate Commerce Act, by the purpose of the grant of suspension power to the Commission, and by a reading of the provisions of Section 4(d) and (e) of the Act as a whole.

As this Court stated in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341, when a natural gas company files a notice of rate change, the Commission has the power under Section 4(e) of the Act "to preserve the status quo pending review of the new rate by suspending its operation" for five months after the new rate would otherwise go into effect. It seems obvious that the maintenance of the status quo means that, during the suspension period, the old rate is to continue in effect.

Moreover, since the language of the suspension provision of the Natural Gas Act was taken bodily from the Interstate Commerce Act, the prior construction of the latter is authoritative on the meaning of the suspension provision in Section 4 of the Natural Gas Act. See, *e.g.*, *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 807 (C.A. 4). That the Power Commission's construction, upon which the orders here challenged were based, is correct is supported by the fact that, for more than 20 years prior to the enactment of the Natural Gas Act, the Interstate Commerce Commission has construed the suspension provisions of the Interstate Commerce

Act in the same manner. See, *e.g.*, *Lumber to Texas Ports*, 44 I.C.C. 275, 276; *Guyton & Harrington Mule Co.* v. *Louisville & Nashville R.R. Co.*, 50 I.C.C. 546, 550.

By providing the Commission with the power to suspend new rates for five months, Congress not only hoped that the Commission might conclude its investigation of new, and possibly unjust or unreasonable, rates before permitting them to be charged and collected but, in addition, indicated that it would not be unduly burdensome on a natural gas company to continue collecting its old rate for six months (thirty days' notice and five months' suspension) after it had filed for a changed rate. Petitioner seeks to circumvent this legislative policy by insisting that it can file successive increased rates in such a way that some of its rates will remain in effect for less than six months. While the Commission believes that the five-month suspension period is, in fact, normally too short to permit completion of all phases of an increased rate proceeding under the Natural Gas Act,[4] petitioner's position, if accepted, would effectively curtail the usefulness of even the present five-month suspension period.

The facts of this case are illustrative. Petitioner here sought to put its second set of increased rates,

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[4] In its annual report to the Congress for the fiscal year 1961 (not yet transmitted or published) the Commission is recommending that Section 4(e) be amended to authorize the Commission, in its discretion, to extend the time of the suspension of a proposed change for a period of not more than six months beyond the original five months' suspension period.

which were filed November 30, 1959, into effect on January 1, 1960, or about two months prior to the expiration of the suspension of the first set of increased rates on March 1 or 9, 1960. Under petitioner's view, the second suspension would have expired on June 1, only three months after the effective dates in March 1960 of the rates first suspended. Even if the Commission is not able to conclude the investigation of the first set of increased rates during the suspension period, there is no reason why the seller should not be required to charge those rates for at least the minimal period of six months contemplated by the Act.

It should be noted that the Commission's policy and interpretation do not necessarily prevent a withdrawal of a suspended rate prior to the end of the suspension period so as to permit a new increased-rate filing. Indeed, as we have noted at pp. 3-4, *supra*, in this case the Commission originally construed the intent of petitioner's second set of increased-rate filings as a withdrawal. But petitioner thereafter declared that it had not intended to withdraw its first set of increased rates by filing the second set. Accordingly, the Commission properly rejected the second set because they were intended to change the status quo during the period of suspension.

Not only do petitioner's contentions fly in the face of the purpose of Section 4(e) to maintain the status quo during the period of suspension (see p. 7, *supra*), but they would not take into account the requirement

of Section 4(d) that changes may be made only in "schedules then in force." For they would mean that the rate filings expressly proposing to put 15.5¢ rates in effect on January 1, 1960, were intended to change the 13.34802¢ rates that had been suspended until March 1960, not the 10¢-11¢ rates (J.A. 127) which, on January 1, were the rates "then in force." [5]

2. There is no conflict between the decision in this case and that in *Willmut Gas & Oil Co.* v. *Federal Power Commission, supra.* The issue in the *Willmut* case was whether the Commission had the authority and the duty to reject an increased rate filing because the existing rates, which had become effective (subject to refund) at the close of the period for which they had been suspended, were still subject to hearing. The critical factual difference between the *Willmut* case and the present case is that the old rates in *Willmut* were effective at the time the superseding rates, which Willmut sought to have rejected, were filed. Accordingly, the court in *Willmut* had no occasion to deal with the sole issue presented

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[5] Petitioner's contention (Pet. 13-14) that "schedules then in force" means schedules on file, though suspended, not only fails to give effect to the phrase "in force" but in any event does not reflect its actions here. As its November filings provided and as would have followed had they been accepted, petitioner sought to make its second set of increases effective before the end of the previous suspension period so that the changes contemplated, at least in the first instance, had to be changes in the rates in force during the suspension period.

below, namely, whether the Commission can reject a filing which proposes to change the rate in effect *during a suspension period.*

Moreover, petitioner fails to recognize that the basis for both the Commission's position and the court's affirmance here was, as discussed above, that the authority to reject petitioner's second set of filings stemmed directly from the Commission's suspension power and is necessary to protect that power, while in *Willmut* the court found that the relief requested by petitioner was not necessary to effectuate the provisions of the Act. See our Brief in Opposition in the *Willmut* case, No. 506 this Term.

The contextual differences in the two cases not only point up the absence of any conflict in result but also negate the alleged conflict in the construction of the Commission's rule-making authority under Section 16 of the Act. In that respect, the court in the *Willmut* case held that the Commission had not erred in failing to promulgate a rule of a legislative nature to prevent the filing of any increased rates so long as prior rates remained subject to hearing. The court below, by contrast, found only that the Commission has the power under Section 16 to announce, in its rules and regulations, its interpretation of the Natural Gas Act—not that it could make legislative changes by rule making. Indeed, it affirmed the Commission's action because it agreed that the interpretation announced in its rules was correct (Pet. 25). There is clearly no inconsistency in these views.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 564

IN THE

Supreme Court of the United States

October Term, 1961

AMERADA PETROLEUM CORPORATION
Petitioner

VERSUS

FEDERAL POWER COMMISSION
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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REPLY TO BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

Amerada Petroleum Corporation (Amerada), petitioner in the captioned case, hereby replies to the Brief for the Federal Power Commission in Opposition heretofore filed by the Solicitor General.

ARGUMENT

1. *The Conflict Between Circuits:* The contention of the Solicitor General that there is no conflict between the decision

of the Court of Appeals for the Tenth Circuit in the case at bar and that of the Court of Appeals for the District of Columbia in *Willmut Gas and Oil Company v. Federal Power Commission*, 294 F. 2d 245, is plainly incorrect. (Br. 10) It is based upon a factual difference which is wholly immaterial to the *fundamental issue* which is common to both cases.

In *Willmut*, the court held, following the guidance of this Honorable Court in *Mobile*[1] and *Memphis*,[2] that *"Section 4(d) of the Act does not give the Commission discretion to reject schedules of increased rates tendered by a natural gas company . . ."* (Emphasis added.) (Pet. 32) In contrast, the court below in the case at bar found in Section 4(d) "a clear token of Congressional implication" which, it held, clothed the Commission with authority to reject notices of rate increases filed by Amerada. (Pet. 25) *Willmut* teaches without equivocation that the Act *"does not contemplate that the Commission may refuse to file a tendered new schedule showing changes in rates, or that it may summarily reject or disallow the new schedule without a hearing."* (Emphasis added.) (Pet. 32) Application of the rule of *Willmut* to the facts of the case at bar could only result in a decision *contrary* to that reached by the court below. Manifestly the factual difference in the two cases relating to the time when the rate increases in question were to be made, relied upon by the Solicitor General, is of no moment. What is

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[1] United Gas Pipeline Company v. Mobile Gas Service Company, 350 U.S. 332 (1956).

[2] United Gas Pipeline Company v. Memphis Light, Gas and Water Division, 358 U.S. 103 (1958).

important is the very basic conflict between the two decisions concerning the scope of the Commission's authority under Section 4 of the Natural Gas Act. It is this conflict which, Amerada submits, this Honorable Court should resolve.

The Solicitor General's position that there is no conflict between the decision below in the case at bar and that in *Willmut* concerning the scope of Section 16 of the Act, is, of course, based upon the validity of his position that there is no conflict in the two cases concerning the Commission's authority under Section 4, a position which we have shown is not tenable. The court below relied, in part, upon the Commission's "sweeping" administrative power under Section 16 of the Act in upholding the Commission's summary rejection of notices of rate changes filed by Amerada. (Pet. 2a) In *Willmut*, however, the court held that the "broad power" conferred by Section 16 *"does not authorize an order, rule or regulation which would nullify or restrict the right of a natural gas company to change the rates under which it offers to furnish service*, subject only to the requirement of Section 4(d) of the Act that it notify the Commission of the changes so that it may proceed under Section 4(e)." (Emphasis added.) (Pet. 34-35) The conflict between the two cases is clear and basic. It should be resolved by this Honorable Court.

2. *The Error of the Decision Below:* In support of the decision of the court below, the Solicitor General argues that rejection of notices of rate increases to be made while prior increases relating to the same sale are suspended is necessary to preserve the *status quo* pending review of the lawfulness of the

prior increases and to "protect" its power of suspension against subsequent increases in the interim. The short answer to this argument is that the Commission may maintain the *status quo* existing prior to any rate increase and may "protect" the effect of any suspension order by suspending each and every subsequent rate increase which may be made. Indeed, this is the course of procedure originally embarked upon by the Commission in the case at bar. (Pet. 4) The Commission is specifically given this power by the Act. Rejection of notices of rate increases is not, however, among those powers conferred upon the Commission by the Act and achieves no result other than to deprive natural gas companies of revenues to which subsequent investigation may show them to be lawfully entitled.

The Solicitor General correctly states that the Act contemplates that a natural gas company may be required to collect an old rate for six months *after it has "filed for" a changed rate.* (Br. 8) This restriction is specifically provided by Section 4(e) of the Act. This does not mean, however, that a natural gas company may be required to collect an old rate for six months *after it becomes effective* as the Solicitor General contends. (Br. 9) There is nothing in the Act which suggests that "locked in periods" (*ie.*, periods terminated by the taking effect of a rate change) may be no shorter than six months in duration. If, as in the case at bar, notice of a changed rate is filed before a prior change is made effective, there is nothing in the Act which allows the Commission to suspend the operation of the second change for more than six months after notice thereof is filed

or five months after it would otherwise have become effective.

Further, a prohibition of rate changes oftener than once every six months is not only unsupported by the Act, but would serve no public purpose. As shown in our petition, those restrictions on rate changes *specified* in the Act are the only ones necessary for the Commission to discharge its sole function of rate review. (Pet. 11-12) Thus the Commission may suspend *each* rate change and may impose an obligation to refund upon the collection of *each* change resulting in a rate increase, *regardless of their frequency*. The Commission may not arbitrarily impose restrictions not contained in the Act and wholly unnecessary to the purposes of the Act.

The reliance by the Solicitor General upon decisions of the Interstate Commerce Commission to support the action of the Federal Power Commission in the case at bar completely ignores the basic difference between the system of regulation established by the Interstate Commerce Act and that established by the Natural Gas Act. This difference in the two regulatory systems was explained by this Honorable Court in *Mobile* as follows:

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. ***In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts.*** See *Armour Packing Co. v. United States*, 209 U.S. 56, 52 L. Ed. 681, 28 S. Ct. 428.

> The Commission in its brief recognizes this basic difference between the two Acts and notes the differing natures of the industries which gave rise to it. The vast number of retail transactions of railroads made policing of individual transactions administratively impossible; effective regulation could be accomplished only by requiring compliance with a single schedule of rates applicable to all shippers. On the other hand, only a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor. *Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.*" (Emphasis added.) 350 U.S. 338, 339.

Inherent in a system of regulation founded upon contracts between buyers and sellers is the right of the parties to change the contract price from time to time as they deem necessary, subject, of course, to the power of the regulatory body to review the lawfulness of such changes. A restriction upon the frequency with which such changes may be made is not necessary to the reviewing function and is wholly inconsistent with such a regulatory system since the timing of rate changes is an important part of the "individualized arrangements" permitted. This, however, is not the case under the uniform tariff system established by the Interstate Commerce Act. A rule that a new tariff may not be filed while a prior tariff relating to the same service is suspended is entirely consistent with such a system. Hence,

interpretations of the Interstate Commerce Act are not of value in this case.

CONCLUSION

For all the reasons stated herein and in Amerada's petition, it is respectfully submitted that a writ of certiorari should issue in this case.

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